NO. 20272

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT CLAUDE BECKETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney.
SHELBY R. GOTT,
Assistant U.S. Attorney.

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee.

MAR 14 1967

NO. 20272

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT CLAUDE BECKETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney,
SHELBY R. GOTT,
Assistant U.S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

NO. 20272

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT CLAUDE BECKETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

On November 12, 1964, the Federal Grand Jury for the Southern District of California, Southern Division, returned a two count Indictment charging the appellant with violations of Title 18, United States Code, Section 2, and Title 21, United States Code, Section 174 (illegal sale of narcotics, concealment of illegally imported narcotics and aiding and

abetting). On November 30, 1964, the appellant entered his plea of not guilty as to each count. On January 19, 1965, trial by jury commenced before the Honorable John C. Bowen and on January 22, 1965, the appellant was convicted as to each count. On January 28, 1965, the appellant was sentenced to a five year period of incarceration on each count to be served concurrently. On February 3, 1965, a Notice of Appeal was filed. [C.T.2-4, 18-23,25,27] [1/].

The jurisdiction of the United States District Court for the Southern District of California, Southern Division, was based on Title 18, United States Code, Section 2 and 3231 and Title 21, United States Code, Section 174.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES AND RULES INVOLVED

A. Statutes:

Title 18, United States Code, Section 2, reads in pertinent part as follows:

1/ "C.T." Refers to Clerk's Transcript.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 21, United States Code, Section 174, reads in pertinent part as follows:

> Whoever fraudulently or knowingly.....receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any narcotic drug, after being brought in, knowing the same to have been imported or brought into the United States contrary to law.....
>
> Whenever on trial for a violation, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendent explains the possession to the satisfaction of the judge.

B. Rules:

Rule 29 of the Federal Rules of Criminal Procedure

reads in pertinent part as follows:

> The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment... after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

III

STATEMENT OF THE CASE

A. Questions Presented

I. The insufficiency of evidence to sustain conviction necessitates reversal.

II. The insufficiency of evidence to sustain the judgment of conviction necessitates reversal as plain error despite the failure to renew the motion for acquittal at the close of all the evidence.

B. Statement of the Facts

On April 4, 1963, Gordon O. Dodge and Agent Richard Salmi of the Federal Bureau of Narcotics met appellant Robert Claude Beckett, who has previously been convicted of violation of California narcotic laws, at his television store in San Diego, California in

the early afternoon. [R.T. 5-6,48,137].[2/]

They asked appellant for heroin and cocaine in large quantities. Appellant told them that he dealt primarily in marihuana but that he would provide a contact for them to purchase either heroin or cocaine. [R.T.7,49,73].

Appellant called a person that he knew dealt in cocaine and heroin and used a prearranged code system in their conversation. As a result of this conversation appellant told them that there was no cocaine or heroin available. However appellant told them to call back around 9:30 that evening and at that time he should have cocaine and heroin located. [R.T. 8-9, 50, 74-76].

Around 9:00 P.M. on April 4, 1963, they made a telephone call to appellant. Appellant told them that there was no cocaine at that time. He gave them the name and number of an individual to call. [R.T. 10-11,51-52. 77-80].

Mr. Dodge and Agent Salmi attempted, unsuccessfully to locate this individual. Around 9:30 P.M., they called appellant again told him that they had been unsuccessful in locating the cocaine and heroin peddler that appellant had previously mentioned.

2/ "R.T." refers to Reporter's Transcript.

They told appellant that they had $400 to spend for cocaine and heroin and appellant told them to call back in a few minutes. [R.T. 11,52,81].

They called appellant again and appellant told them to call Jesse at a specific number and tell Jesse that appellant told them to call. [R.T.11-12,46,53,82-83].

Appellant called Jesse and told him that Mr. Dodge and Agent Salmi would be calling in order to arrange for the purchase of narcotics. Jesse prior to this call had not heard of or met Mr. Dodge and Agent Salmi. Jesse would not have had anything to do with Mr. Dodge and Agent Salmi if appellant had not called. [R.T. 57-58, 60-61,63].

Mr. Dodge and Agent Salmi called Jesse. Jesse told them that appellant had called and told him that they would be calling in order to purchase a quantity of heroin. They agreed to meet in San Diego and arrange for the purchase of heroin. [R.T. 12,44,53, 66,83-84, 102].

Mr. Dodge and Agent Salmi met with Jesse. He told them that he could get some heroin for them but that it would take a day or so. Jesse gave them a phone number where he could be reached. [R.T.53,55,59,67-68,83-84,91,101].

On the same day Jesse told Agent Salmi that appellant furnished him with customers for the purchase of narcotics. R.T. 181 .

On April 6, 1963, Jesse was called again. Jesse said that he had the heroin and a meeting was arranged. They met and Salmi paid Jesse $175 for an ounce of heroin. 3/ R.T.59-60, 98,101-103,130 Exhibit A, 1, 1A, 1B and 1C.

On April 8, 1963, Agent Salmi and Agent Fuentes, a state narcotics officer, met with appellant at appellant's television store. Agent Salmi told appellant that he had purchased the heroin from Jesse and they were satisfied with it. They, along with Mr. Payne, a friend of appellant, discussed their desire to purchase several kilos of marihuana. Appellant at this time indicated knowledge of the procedure required to purchase marihuana

---

3/ Subsequent to the first meeting between Jesse and Agent Salmi on April 4, 1963, and prior to the sale of heroin on April 6, 1963, Jesse purchased the heroin involved in this case in Mexico. Mr. Dodge and Agent Salmi did not know that Jesse was going to, and in fact had, purchased the heroin in Mexico. R.T.60,90,93,96,100 .

in Mexico and the illicit entrance of the marihuana into the United States. Evidently appellant agreed to aid them in purchasing marihuana. [R.T.142,148-149,269-272,274].

On April 11, 1963, Agent Fuentes called appellant and in veiled language they discussed whether or not marihuana was then available. On the same day around 10:00 P.M., Agents Fuentes and Salmi met with appellant and Mr. Payne at appellant's television shop. The purchase of marihuana was again discussed but no agreement was reached. It is to be noted that appellant during a part of the conversation which took place was smoking a marihuana cigarette. R.T.151,276,283-284,286-289.

On November 4, 1964, Agent Salmi and Customs Agent Maxcy met appellant at the television store. A discussion concerning narcotics took place. Agent Salmi reminded appellant that he had previously arranged for the purchase of "stuff" south of the border. Appellant told Agent Salmi that he remembered the heroin transaction. The discussion concluded when appellant was arrested for violation of federal law. [R.T.99-101,301-302]. 4/

4/ It should be noted that the testimony of appellant on his own behalf differed materially with the testimony of law enforcement officials at the trial.

IV

ARGUMENT

A. THE EVIDENCE IS SUFFICIENT TO PROVE APPELLANT'S KNOWLEDGE OF ILLEGAL IMPORTATION.

It is well settled that on Appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U.S.60 (1942)

Stein v. United States, 337 F.2d 14 (9th Cir. 1964)

Considering the facts most favorable to the government, there can be no dispute that appellant aided and abetted the sale, transportation and concealment of the heroin as charged in counts one and two of the indictment. Since appellant does not contest this, no argument is made on the point.

Mathis, who sold the narcotics to Salmi, testified the narcotics were imported from Tijuana contrary to law [R.T.41,60]. The jury could reasonably infer appellant knew this.

Appellant made two prior attempts to furnish a source of heroin and one phone call was made in code in Agent Salmi's presence [R.T.8-11,50-53].

Was "Cal" or "Gal", that appellant called, the same as Mathis' friend, Caroline Walker mentioned by appellant R.T. 50,

64-65,200 . The jury might so find.

As soon as appellant learned Salmi and Dodge had $400 to spend, he said "call me back in 15-minutes". He talked to Mathis during that 15-minutes period R.T.51-53 . Because of the apparent relationship, it could not be too speculative to believe appellant was told that the heroin must be brought up from Tijuana.

Appellant admitted to Salmi later that he knew about the transaction R.T. 101 .

Appellant knew where Mathis lived. R.T.205-207 . This was near the border. Mathis has known Beckett since 1962 R.T.62 .

There is some circumstantial evidence from which the jury could find appellant smuggled the heroin into the United States.

Appellant goes to Mexico every Saturday and every Sunday. Since his marihuana conviction in 1948 he was required to, and did register with Customs officials at the port of entry. He was friends of Customs and they never searched him. He placed bets for them at the race track and didn't charge them for this service. R.T.201-2,212

The first contact with Mathis by Agent Salmi was April 4, 1963 on a Thursday (R.T.48). If appellant wasn't bringing the heroin through, why wait until Sunday, April 7? Mathis told him to call on

Saturday and the heroin would be available. Mathis could have picked up the heroin (R.T.102) sooner, as near as he was to the border.

Agent Salmi and Agent Ellis of Customs were watching for Mathis to come through. Mathis never came through the line R.T.145 .

Mathis was reluctant to say how the heroin got into the United States from Mexico.

Under cross examination of Mathis by Mr. Langford, the following occurred:

Question: And on that request you then went to Mexico and acquired narcotics? Is that correct?

Answer: Yes.

Question: You smuggled them across the border?

Answer: I got them across (R.T.41).

A further direct examination of Mathis was as follows:

Question: Where did you get that 14 grams of heroin?

Answer: It was purchased in Mexico.

Question: Do you know that it did come from Mexico?

Answer: Yes. R.T.60 .

B. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND POSSESSION IN APPELLANT.

Possession is sufficient to convict unless explained to the satisfaction of the jury. See Title 21 United States Code, Section 174.

Appellant testified and didn't deny knowledge of illegal importation.

Possession may be actual or constructive, sole or joint, and may be proved by circumstantial evidence.

Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).

Physical custody by an agent may be attributable to a principal.

United States v. Hernandez, 290 F.2d 86 (2nd Cir. 1961)

United States v. Posaris, 327 F.2d 56 (2nd Cir.1964)

Arellanes v. United States, 302 F.2d 603 (2nd Cir.1964), cert.denied, 371 U.S.930.

There was sufficient evidence for the jury to find that Mathis was the agent of appellant.

The close relationship between appellant and Mathis was no doubt considered by the jury as in Eason v. United States, 281 F.2d 818,821 (9th Cir. 1960).

The Court, in the Eason case, said the evidence of close

friendship and general conduct warrant a reasonable jury finding... "that possession was joint".

A case very similar in its facts to this case is Espinoza v. United States, 317 F.2d 275 (9th Cir. 1963), where a purchase of narcotics was arranged in two telephone calls. Jessie Espinoza was found to have constructive possession of the heroin even though she did not have physical possession and was not present when the sale was completed by delivery.

Also, see Cellino v. United States, 276 F.2d (9th Cir.1960)

The presumption should be favored particularly with respect to opium derivatives such as heroin. Opium poppies are not grown in the United States where marihuana may be grown here. Heroin may not be imported legally except for very limited purposes.

Marcella v. United States, 285 F.2d 322 (9th Cir. 1960)

Hernandez v. United States, 300 F.2d 114,118 (Footnote 11) (9th Cir. 1962)

Chavez v. United States, 343 F. 2d 85, (9th Cir. 1965)

Yee Hem v. United States, 268 U.S.178

Caudillo v. United States, 253 F.2d 513,515 (9th Cir. 1958)

Where the defendant is an important and integral part of the narcotic operation and not a mere casual aider and abetter, the jury

properly found the defendant to have had the requisite possession.

United States v. Panica, 290 F.2d 97 (2nd Cir. 1961)

It is not necessary that the aider and abetter have direct financial interest in the illegal sale of narcotics.

United States v. Manna , 353 F.2d 191 (2nd Cir. 1965) cert. denied 384 U.S.975.

The jury was properly instructed.

Jury instructions are presumably followed, Teasley v. United States, 292 F.2d 460,467 (9th Cir. 1961).

The test is not whether the Court of Appeals would have found the defendant guilty, but whether a reasonable jury would have done so. Figueroa v. United States, 352 F.2d 587 (9th Cir. 1965)

The case of Jones v. United States, 308 F.2d 26 (2nd Cir. 1962) relied on so heavily by appellant, is clearly distinguishable on its facts.

Existing in the case at hand, but not present in the Jones case, was testimony of the narcotics being smuggled into the United States, and the person who smuggled the narcotics or knew of it (Mathis) testified. R.T.60 .

The Court, in Jones, at page 33, gave considerable weight to the fact that the defendant was faced with a "situation that would

require him to explain away not his own possession but someone else's possession of them."

The Court further said "the absent principal who possessed the narcotics might have an explanation proving that they were legally imported or were of native origin. One charged as an aider and abettor to that principal might be convicted by his inability to rebut the presumption even though in fact the principal had not violated a penal statute at all."

The objections raised by appellant on the Jones theory appear to be cured in the instant case since the principal testified the narcotics were smuggled into the United States and was cross-examined at length on the subject by experienced counsel. R.T.62-65 .

C. APPELLANT WAIVED HIS RIGHT TO RAISE THE QUESTION OF SUFFICIENCY OF THE EVIDENCE.

Appellant made a motion for judgment of acquittal at the close of the government's case but failed to renew the motion at the close of the trial.

Appellant has waived his right to question sufficiency of the evidence on appeal.

Lupo v. United States, 322 F.2d 569 (9th Cir. 1963)

Hardwick v. United States 296 F.2d 24 (9th Cir. 1961)

Appellant having proceeded to put on a case after the government puts on its case in chief amounts to a waiver of his rights, if any, to a motion for judgment of acquittal at that time.

United States v. Calderon, 348 U.S.160,164 (footnote 1)(1954)

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Ege v. United States, 242 F. 2d 879 (9th Cir. 1957)

The facts in this case do not justify the finding of plain error. Though such a finding is clearly within the power of the Appellate Courts it is "a power rarely exercised".

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Bilboa v. United States, 287 F. 125 (9th Cir. 1923)

Similar restricted approaches to the plain error rule has been taken in other Circuits.

Johnson v. United States, 291 F.2d 150 (8th Cir. 1961)

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)

Where appellant was represented at the trial by retained and experienced counsel, it is submitted plain error should not be recognized so readily.

V

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney,

SHELBY R. GOTT,
Assistant U.S.Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT,
Assistant United States Attorney